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No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1935

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE TO LIBERTY CENTRAL TRUST COMPANY, AS SOLE RESIDUARY LEGATEE AND DISTRIBUTEE OF THE AMERICAN ESTATE OF WILLIAM J. ORTHWEIN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The findings of fact and opinion of the Board of Tax Appeals (R. 26) are reported in 28 B. T. A. 107. The opinion of the Circuit Court of Appeals (R. 59) is reported in 75 F. (2d) 416.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 17, 1935. (R. 62–63.) The petition for a writ of certiorari was filed April 17, 1935, and granted May 20, 1935. (R. 64.) The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent created an *inter vivos* trust with directions (1) to pay the income therefrom for life to a daughter, upon whose death prior to that of the creator the trust should terminate and the corpus be delivered to the grantor; or (2) if the grantor should predecease the daughter, for continuance of the trust with disposition of the income and corpus as provided in the trust instrument.

The question is whether the interest of the decedent therein should be included in his gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death", under Section 302 (c), Revenue Act of 1924.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 25–28.

STATEMENT

The facts in this case, as stipulated (R. 39–55) and found by the Board of Tax Appeals (R. 28–31), may be summarized as follows:

The decedent, William J. Orthwein, a citizen of the United States, died on September 4, 1925, then a resident of Switzerland.

The decedent, by indenture dated January 1, 1920 (R. 48), created an *inter vivos* trust, with which we are herein concerned, naming as trustee the Mercantile Trust Company, which was succeeded by the Mercantile Commerce Bank & Trust Company, one of the respondents herein. The Commissioner included in the decedent's taxable estate the then value of decedent's interest in the assets which constituted the corpus of this *inter vivos* trust.

Under the will of the decedent, executed November 28, 1923, he created another trust, of the American estate of the decedent, the provisions of that trust not being involved in this proceeding. He named as trustee of the trust under the will the Liberty Central Trust Company, which was also named as executor of the American estate. The Liberty Central Trust Company, as executor, made final distribution to itself as trustee of the trust created by the will, and was discharged as executor. Thereafter the St. Louis Union Trust Company succeeded the Liberty Central Trust Company as trustee under the will. The St. Louis Union Trust Company, as sole distributee in its trust capacity of the residue of the estate, would be liable to pay any additional estate tax on the *inter vivos* trust, and is therefore named as a respondent herein.

By the indenture creating the *inter vivos* trust the decedent transferred various securities to the

trustee to hold, manage, and dispose of as an active trust and to pay the net income thereof to the decedent's daughter, Alma Feraldo, during her life and upon her death to make disposition thereof as provided in the indenture.

The indenture provided that if the daughter predeceased the grantor the trust should terminate and the trust estate should be paid over to the grantor, if living. The trustee was given discretionary power to terminate the trust when the trustee might deem it wise.

The trust indenture further provided that upon the death of the grantor's daughter, if the grantor were not then living, the income, or as much thereof as the trustee deemed wise, should be used for the benefit of the grantor's wife if living, and after her death and the death of the daughter, if the daughter were survived by a child or children, then for their equal benefit during their minority, and upon their majority, the corpus of the trust estate was to be distributed to them or the survivors of them. It contained a further provision for disposal of the trust estate to the next of kin of grantor in the event of the daughter leaving neither the grantor, his wife, nor any children of her own surviving her. (R. 52–53.) It also provided that during the lifetime of the daughter the grantor should have no further individual or beneficial interest in the transferred property. (R. 48.)

The daughter did not predecease the decedent but survived him. The value of the trust securities

at the date of decedent's death was $101,421.24 and the then value of the decedent's remainder interest subject to the daughter's life estate was $34,544.06. (R. 30–31.)

The Commissioner, in determining the deficiency claimed herein, included the remainder interest at that value. Upon review, the Board of Tax Appeals decided against the Commissioner. (R. 31–33.) The Circuit Court of Appeals affirmed the decision of the Board. (R. 60–63.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the value of the decedent's interest in the trust property should not be included in the gross estate of the decedent under Section 302(c), Revenue Act of 1924, as a transfer intended to take effect in possession or enjoyment at or after death.

2. In affirming the Board of Tax Appeals on the authority of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *May* v. *Heiner*, 281 U. S. 238; and *McCormick* v. *Burnet*, 283 U. S. 784.

3. In affirming the Board of Tax Appeals.

SUMMARY OF ARGUMENT

The decedent retained an interest in the corpus of the trust property which did not pass until his death. The court below denominated such interest as a mere possibility of reverter and upon that ground denied application of the statute. This action, we submit, is contrary to the principles an-

nounced by this Court governing the construction and application of the controlling provision. The cases relied upon by the court below are believed to be without authority in the circumstances, and do not require an affirmance of the decision here.

Proper construction and application of the statute to facts not distinguishable from those here, was just recently given by the Second Circuit Court of Appeals in *Commissioner* v. *Schwarz*, 74 F. (2d) 712. The facts in the instant case require a like conclusion.

We submit that the grantor herein retained an interest in the property the same in substance as that retained by the grantor in the case of *Klein* v. *United States*, 283 U. S. 231, and that the retention of this interest by the grantor herein made the transfer one intended to take effect on the grantor's death within the meaning of Section 302(c) of the Revenue Act of 1924, just as the retention of the similar interest by the grantor in the *Klein* case brought the transfers within the same statutory provision. If Klein survived another, the property was his; if he died first, the property went to another. If, here, the grantor survived another, the property was his; if he died first, the property went to others. Similarly, in both cases, the facts meet the test prescribed by this Court in *Tyler* v. *United States*, 281 U. S. 497, 503, namely, "whether the death has brought into being or ripened for the survivor, property rights of such character as to

make appropriate the imposition of a tax upon that result * * *."

We therefore contend that the decision in this case is controlled by this Court's decision in *Klein* v. *United States*, where the question involved is not fairly distinguishable from that raised here.

ARGUMENT

THE SETTLOR RETAINED A SUBSTANTIAL INTEREST IN THE CORPUS OF THE TRUST PROPERTY, WHICH INTEREST PASSED TO OTHERS AT HIS DEATH. IN THAT SITUATION THE STATUTE IMPOSES A TAX

This case involves the construction and application of Section 302(c) of the Revenue Act of 1924, *infra*, p. 25, which provides as follows:

> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * *.
>
> (U. S. C., Title 26, Sec. 1094.)

This provision of law was first included in Section 202(b) of the Revenue Act of 1916, and also included in Section 402(c) of the Revenue Act of

1918, in Section 402(c) of the Revenue Act of 1921, and in Section 302(c) of the Revenue Act of 1926, which continued in effect under the 1928 Act. The provision was amended in 1931 by H. J. Res. No. 529, *infra*, p. 27, and as amended remained in effect under the Revenue Acts of 1932 and 1934.

The decedent died on September 4, 1925, while Section 302(c) of the Revenue Act of 1924 was in effect. The trust was created by the deed of January 1, 1920, while the similar provision of the Revenue Act of 1918 was effective. As the language in question was in force when the trust was established as well as when the decedent died, no question of constitutionality is involved. *Milliken* v. *United States*, 283 U. S. 15; *Klein* v. *United States*, 283 U. S. 231.

By the terms of the deed the settlor transferred certain property to a trustee with directions to pay the income therefrom to a daughter during her lifetime. Upon the death of the daughter, if grantor was still living, the trust was to terminate and the entire estate be delivered to him. If the grantor died during his daughter's lifetime, then upon the termination of her life estate the corpus was to be distributed to the child or children of the daughter, subject to certain conditions not important here. (R. 48, 52-53.)

The Board of Tax Appeals and the court below found that the decedent did, by virtue of the provisions of the trust instrument, retain an interest in the corpus of the trust property. They denomi-

nated such interest as "reversionary" or "a possibility of reverter" and upon this ground held the interest was not intended to pass at the death of the grantor within the meaning of the statute. To support such conclusions this Court's decisions in *May* v. *Heiner,* 281 U. S. 238, and *McCormick* v. *Burnet,* 283 U. S. 784, were cited as pertinent and controlling. Obviously, *May* v. *Heiner,* in which the settlor reserved to himself no interest in the corpus, is not in point here. And, as stated hereinafter, we believe the *McCormick* case is without authority here.

The sole question presented in this case is whether the interest retained by the decedent in the corpus of the trust created by him should be included in his gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death," within the meaning of Section 302(c), *supra.*[1]

[1] The respondents suggested in the lower court that by Article 11, Treasury Regulations 68, *infra*, p. 26, the Government interpreted Section 302(c) of the Revenue Act of 1924 as meaning that *contingent* interests, even when they were remainders, were not required by the Act to be included in the gross estate for the purpose of the estate tax. Such a conclusion is erroneous. The liability of Article 11, when examined in its proper context, relates not to Section 302(c), but to Section 302(a), which describes and numerates the classes of a decedent's property which shall be included in decedent's gross estate under that subdivision. This case arises under Section 302(c) (interpreted by Articles 17–18, *infra*, pp. 26–27), and is concerned with property which the decedent owned in fee during his lifetime and which he transferred in trust, retaining, however, an interest for himself.

Under the statute the thing taxed is the transmission of property, or an interest therein, from the dead to the living. *Heiner* v. *Donnan*, 285 U. S. 312, 322. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Heiner* v. *Donnan*, *supra*.

In construing and giving effect to a related subsection of the statute, this Court declared, in *Tyler* v. *United States*, 281 U. S. 497, 502:

> Death duties rest upon the principle that death is the "generating source" from which the authority to impose such taxes takes its being, and "it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties." *Knowlton* v. *Moore*, 178 U. S. 41, 56, 57. * * * If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.
>
> The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the

> survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

In the instant case, the question for determination is similar. We maintain that since the right of the daughter's children (and other named beneficiaries) to take under the trust instrument depended upon the death of the grantor prior to that of his daughter, the death of the decedent was the "generating source" of "important and definite successions to the property rights" of these benficiaries in the corpus of the property transferred. Plainly, it enlarged their defeasible interest in the property into an indefeasible one. It is precisely such an enlargement or ripening of property interests for the benefit of the living which is the occasion for the tax. *Tyler* v. *United States, supra; Chase Nat. Bank* v. *United States,* 278 U. S. 327; *Porter* v. *Commissioner,* 288 U. S. 436, 444.

Under the law of Missouri, the jurisdiction governing the trust in the instant case, the decedent, it is submitted, created in himself a vested remainder subject to divestment by his death. The law there favors vested estates, and the rule is that estates shall be held to vest at the earliest possible period unless a contrary intention is clearly manifested in the grant. *Tindall* v. *Tindall,* 167 Mo. 218, 225, citing *Doe* v. *Considine,* 6 Wall. 458;

Heady v. *Hollman*, 251 Mo. 632, 638; *Green* v. *Irvin*, 309 Mo. 302, 306. Since the person was in existence (the grantor) who was first to take the remainder after the termination of the life estate, such interest became a vested one, subject only to divestment by his death. 2 Washburn, *Real Property*, 4th ed., pp. 548, 550, 551.

Certainly, under the local law, the children of the life tenant, and the other named beneficiaries, cannot be said to have received vested remainders under the deed, since their right to take at all was contingent not only upon their surviving the life tenant, but also upon the decedent's death prior to that of the life tenant. *Hartnett* v. *Langan*, 282 Mo. 471. Cf. *Wallace* v. *Commissioner*, 27 B. T. A. 902, affirmed *per curiam*, 71 F. (2d) 1002 (C. C. A. 2d), certiorari denied, 293 U. S. 600. Moreover, there was a further contingency with respect to the interests of the life tenant's children (and other named beneficiaries) since their rights were subject to obliteration at any time if the trust was terminated by the trustee prior to the death either of the grantor or the life tenant.

But, however the remainder interests may be technically described, it is perfectly clear that under the local law the decedent retained a substantial property interest which, upon his death, passed to the other remaindermen.

This trust contained a specific provision that if the daughter died while the grantor was still living the trust should immediately cease and all the

property then held in trust should revert to the grantor without qualification or restriction. Only in the event that the grantor predeceased his daughter did there arise in the children of the daughter (and other named beneficiaries) the right to take under the trust instrument. Until the grantor's death, the interests of these contingent remaindermen in the corpus were not final and complete. They might be obliterated at any time by the life tenant's death prior to that of the grantor. This qualification was not removed until the grantor's death and then only because of his death. We submit, therefore, that as to the corpus of the trust the transfer of the remainders was intended to take effect at the grantor's death.

This conclusion is compelled, we submit, by this Court's decision in *Klein* v. *United States*, 283 U. S. 231. The question involved in that case was the proper construction of Section 402(c) of the Revenue Act of 1918, which is in the same language as Section 302(c) of the Revenue Act of 1924 presented here. In that case a husband conveyed property to his wife for life with the provision that if she should survive her husband then she should take the property in fee simple. The husband died before the wife, and the Commissioner of Internal Revenue assessed a tax against the husband's estate on the ground that the transfer was one "intended to take effect in possession or enjoyment at or after" the husband's death. This

Court upheld the Commissioner's action, saying (p. 234):

> * * * It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed.

The substantial effect of the limitation in the instant case is precisely the same as that involved in the *Klein* case. In the instant case the death of the grantor before his daughter removed the possibility of his retaking the property, and hence his death was the "indispensable and intended event" upon which the continued existence of the trust depended, for the benefit of the interests subsequent to the life estate. Similarly, in the *Klein* case, the death of the husband before the wife was the event which insured her holding the property free of the possibility of its reverting to him.

The lower court, however, distinguished the *Klein* case on the ground that there (R. 62)—

> the legal title was retained by the grantor and passed to the grantee with the grantor's death, while here the grantor parted with the title and all beneficial interest in the property, and retained no right with respect thereto that would pass to anyone as the result of his death. In the *Klein* case, death

> was the generating source of title, while in this case the trust instrument was the source of title and death merely destroyed a possibility that the trust property might revert to the grantor.

It is plain, we submit, that the distinction made by the lower court is one merely of title, and looks solely to the form rather than the substance of the conveyance. We submit that there, as here, any title acquired by the grantee was pursuant to the instrument of conveyance (deed or trust); and that in both cases death was the occasion for the ripening or enlargement of the interest of the grantee theretofore acquired under the instrument. Furthermore, any technical difference, under real property law, in the interest conveyed, is not controlling in this situation; for, as this Court stated in the *Klein* case, *supra*, "*nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders.*" Death is the generating source of economic enjoyment, whether the continuance of a trust (as here) or the vesting of title (as in the *Klein* case) is dependent on that event. Since a distinction between the two types of limitation is purely formal and has no effect upon the substantial interests of the parties to the transaction, the decisions of this Court make it plain that it can have no significance in the application of the taxing statutes.

This Court has repeatedly stated that it is the substantial effect of transactions that is important for the purpose of taxation and not the form in which they are cast. *Corliss* v. *Bowers*, 281 U. S. 376, 378; *Tyler* v. *United States*, 281 U. S. 497, 503; *Burnet* v. *Harmel*, 287 U. S. 103; *Palmer* v. *Bender*, 287 U. S. 551; *Burnet* v. *Guggenheim*, 288 U. S. 280, 283–284; *Reinecke* v. *Smith*, 289 U. S. 172, 177.

The principle of the *Klein* case has been applied, and regarded as controlling, in the recent case of *Commissioner* v. *Schwarz*, 74 F. (2d) 712 (C. C. A. 2d), in which the facts were substantially the same as in the instant case. The decedent transferred property in trust, a fixed amount of the income from which was to be paid annually to his sister during her life. He reserved to himself a remainder over after termination of the life estate; but if his death occurred prior to the termination of the life estate, his remainder interest should go to his descendants, and if no descendants be then living, to his brothers and sisters then living. Since he died prior to termination of the life estate, the Circuit Court of Appeals held that it was proper to include in his gross estate the value of the remainder interest which passed at his death to his descendants, stating:

> The death of this grantor was the indispensable and intended event which effected a transmission of a remainder interest from

> the dead to the living (*Klein* v. *United States, supra*), and the grant of the remainder interest in the trust fund was necessarily "intended to take effect in possession or enjoyment at or after" decedent's death within the meaning of the statute, section 302(c). • • •

The court there distinguished the very cases cited by the court below in the instant case to support its conclusion herein. In the *Schwarz* case, the court said (p. 713):

> This case is to be distinguished from the class of cases where property is transferred in trust with remainders over to persons other than the grantor and where no remainder is reserved in the grantor.

A like application of the *Klein* decision also has been made in the following cases. In *Sargent* v. *White*, 50 F. (2d) 410 (C. C. A. 1st), a husband created a trust, reserving the income for life and providing that if he survived his wife the trust should cease, but if she survived him she should have the property. The husband died before the wife, and the court held, relying on the *Klein* case, that the property was taxable as a part of his estate as a transfer intended to take effect in possession or enjoyment at or after death. A similar result was reached in *Union Trust Co.* v. *United States*, 54 F. (2d) 152 (C. Cls.), certiorari denied, 286 U. S. 547. See also *Hoblitzelle* v. *United States*, 3 F. Supp. 331, 334 (C. Cls.).

Two other cases have been before this Court involving the application of the pertinent subsection of the statute to facts substantially the same as those now involved, viz., *McCormick* v. *Burnet*, 283 U. S. 784, and *Helvering* v. *Duke*, 290 U. S. 591. For the reasons hereinafter set forth, it is submitted those cases do not require a result different from that contended for on behalf of the Government in the instant case.

In the *McCormick* case the settlor created a trust in which it was provided (see 43 F. (2d) 277–278) that a certain amount of the income should be paid to the settlor during her life. It was further provided that on the settlor's death the income should be paid to the settlor's three children. The settlor might terminate the trust at any time by an instrument in writing signed by her and by one or more of her three children, and after the settlor's death the trust might be terminated by a majority in interest of the beneficiaries. It was further provided that the trust should terminate in any event upon the death of the last survivor of the three children. Upon a termination of the trust the trust property was to be paid to the settlor if she was then living, and if she was not then living it was to be distributed to others as provided in the trust instrument. The *McCormick* case thus involved a limitation somewhat similar to that presented here, since the trust was to cease and determine when all three

children died and Mrs. McCormick might survive them.[2]

The circumstances surrounding the decision indicate, however, that this Court's *per curiam* decision was not intended to be a decision on the question involved in the instant case. The *McCormick* case was argued together with *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, and *Morsman* v. *Burnet*, 283 U. S. 783. All three of these cases involved the common question of whether the reservation of a *life interest* by the settlor of a trust made the transfer subject to taxation under Section 402(c) of the Revenue Act of 1921, or Section 302(c) of the Revenue Act of 1924. This was a question upon which there existed a conflict of decisions among Circuit Courts of Appeals. All three cases were decided together, three days after their argument, in identical *per curiam* opinions based solely on the authority of *May* v. *Heiner*, 281 U. S. 238. *May* v. *Heiner* was an authority in point on the question of the effect of the reservation of a life interest by the grantor of a trust. But it had no connection whatever with the issue which was incidentally raised in the brief in the *McCormick* case concerning the provision in the trust instrument to the effect that

[2] The probability of the contingency happening in the *McCormick* case was much more remote than that here. A parent has far less chance of surviving three children than of surviving one. Mrs. McCormick was 83 years of age when the trust was created.

the grantor would regain the trust property if she survived her three children. Since the three cases involved a common question and were decided in identical *per curiam* decisions on the authority of a case relating solely to that question, we submit that the decision in the *McCormick* case can not be regarded as having disposed of the question which is now before the Court.

That this is true is made plain, we submit, by this Court's decision in *Klein* v. *United States*, 283 U. S. 231, *supra*. The *Klein* case was argued on the same day as the *Northern Trust*, *Morsman*, and *McCormick* cases, and was decided a few weeks later. No mention of the *McCormick* decision appears in the *Klein* opinion. If this Court considered the *Klein* case as distinguishable from the *McCormick* case only on so fine a point as the form of the limitation, we feel confident that it would have rested its decision upon that technical and formal distinction. That it intended no such narrow ruling appears plain from the language of the opinion.

In *Helvering* v. *Duke*, *supra*, the settlor conveyed to his daughter and her descendants, upon certain conditions. Each of the trust instruments contained a specific provision that if the daughter died while Duke was living the trusts should immediately cease and all the property then held in trust should revert to the settlor without qualification. The transfers by their terms did not become complete unless the settlor Duke died while

his daughter was still living. This Court divided equally (Mr. Chief Justice Hughes not sitting), resulting in an affirmance of the decision of the lower court, which in turn had affirmed a decision of the Board of Tax Appeals holding the transfers not taxable. The result in the *Duke* case is not authoritative upon the specific question involved here and has no binding effect as a precedent. *Hertz* v. *Woodman*, 218 U. S. 205. This Court would scarcely have so divided in the *Duke* case if the *McCormick* decision had settled the question.

Since neither the *McCormick* nor *Duke* case can be considered as having decided the issue herein, and since no other decision of this Court, with the exception of the *Klein* case, deals with an interest retained in the corpus of transferred property, the adoption of the suggested construction of the statute will not require the reversal or modification of any prior decision.

Reinecke v. *Northern Trust Co.*, 278 U. S. 339, relied upon by the court below, is obviously not in point. In the trusts involved therein, the settlor did not reserve an interest to himself, nor was there any possibility of the corpus reverting to him. The decision of this Court in that case related to the effect of the settlor's power of revocation, and his control over the transferred property.

In *Wallace* v. *Commissioner*, 71 F. (2d) 1002, certiorari denied, 293 U. S. 600, the decedent transferred certain property to a trustee, to pay the income thereof to her during her life and upon her

death to pay the corpus of the trust over to her daughter, "if she be living"; in the event the daughter predeceased the grantor, the property reverted to the grantor. Thus, the remainder was in the first instance given to another and to the grantor only if that other died before the termination of the grantor's life estate. The Board of Tax Appeals held (affirmed *per curiam* by the Circuit Court of Appeals for the Second Circuit) that under New York law the daughter took a vested remainder by the execution of the trust instrument, and that the interest of the decedent in the property rights fixed by that instrument "must be determined by the laws of the place where the estate is to be administered."

The same (Second) Circuit Court, in deciding the more recent *Schwarz* case, *supra*, upon facts not essentially different from those present here, distinguished the *Wallace* case (along with the *Northern Trust Co.*, *May*, and *McCormick* cases, *supra*) upon the ground that "there the remainders were in form or substance vested to persons other than the grantors and not * * * contingent on the time of his death."

The *Duke* case, *supra*, was distinguished on the ground that in that case there was a mere possibility of reverter, whereas, in the *Schwarz* case the trust was created for the purpose of providing a fixed annual income to a beneficiary for life and the grantor clearly parted with no larger interest in the trust corpus. Accordingly, it was there held

that the grantor's death affected the transmission of his remainder interest to his heirs and justified the tax. We submit that a similar situation exists in the case at bar. Here was a trust created for the benefit of the daughter. During the lifetime of the grantee her sole interest in the trust was to receive the income; during his lifetime she had no interest in the corpus. The corpus was to go to the decedent if the daughter died during his lifetime. Except for the circumstance that the trustee held the naked legal title, the situation is not essentially different from that where the decedent had himself retained the corpus and granted a life estate.

In *Burnet* v. *Guggenheim*, 288 U. S. 280, 286, this Court declared that "there has been a steady widening of the concept of a transfer for the purpose of taxation" under the provisions of the Federal estate tax. *Porter* v. *Commissioner*, 288 U. S. 436; *Gwinn* v. *Commissioner*, 287 U. S. 224; cf. *Tyler* v. *United States*, *supra*.

It is submitted that application of the statute does not depend upon the strict rules of property or the technical classification of the interests conveyed by the trust instrument. Decision here does not depend upon the niceties of the art of conveyancing; it is enough if the death of the grantor was the indispensable and intended event which ripened or brought the larger estate into being for the grantee, thus effecting a transmission from the

dead to the living. *Klein* v. *United States, supra.* If the beneficiaries' interests were defeasible and the decedent's death rendered them indefeasible, there is a transfer within the purview of the statute.

Clearly, the instant case presents such a situation. Until the decedent's death the interests of the other designated remaindermen were contingent, in fact and substance as well as in law. Upon his death, the retained interest in the corpus passed from the decedent; and the other remaindermen's interests were increased accordingly. It is precisely such an enlargement or ripening of property interests for the benefit of the survivors which is taxable under the statute. *Tyler* v. *United States, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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SEPTEMBER, 1935.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. * * *

* * * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

(U. S. C., Title 26, Sec. 1094.)

Treasury Regulations 68, promulgated under the Revenue Act of 1924:

GROSS ESTATE—GENERAL

SEC. 302 * * *

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of

the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate:

* * * * * * *

ART. 11. *Specific property to be included.*—

* * * * * * *

The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder where the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. * * *

* * * * * * *

TRANSFERS INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER DEATH

ART. 17. *General.*—All transfers at any time made by the decedent, other than bona fide sales for a fair consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as of the date of the decedent's death, of the property so transferred must be returned as a part of the gross estate.

ART. 18. * * *

Where there was no reservation of income or an annuity but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income or annuity was payable during the de-

cedent's life to some one other than himself. * * *

H. Joint Resolution 529 (71st Cong., 3d sess.):

Resolved, * * * That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

"(c). To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Approved, March 3, 1931.

[c. 454, 46 Stat. 1516.]

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